STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT J

A Member of the State Bar

No. 85-O-11829

Filed January 26, 1993

SUMMARY

After stipulating to a stayed suspension in a disciplinary matter, respondent moved for full or partial relief from the statutory requirement that he pay disciplinary costs. Respondent argued that the standard formula cost assessment was excessive in this matter because he had attempted to negotiate a resolution of the matter prior to the filing of formal charges; he had offered to stipulate to the same level of discipline ultimately agreed upon and imposed; the failure to reach agreement prior to the filing of formal charges was due to intransigence of counsel for the State Bar, and respondent had made extraordinary efforts in cooperating with the State Bar's investigation of the matter. The hearing judge granted a partial cost reduction. (Hon. Ellen R. Peck, Hearing Judge.)

The State Bar sought review, contending that the hearing judge abused her discretion in granting partial relief. Although finding no bad faith on the part of counsel for the State Bar, the review department held that the hearing judge did not abuse her discretion either in finding good cause to grant relief or in the manner in which she arrived at the amount of the partial reduction awarded.

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: R. Gerald Markle

HEADNOTES

[1 a-c] 135 Procedure—Rules of Procedure
178.77 Relief from Costs—Showing Required
178.90 Costs—Miscellaneous
Under rules 460 and 461 of the Transitional Rules of Procedure, the costs assessed in discipline matters are derived from a formula established by a committee of the State Bar Board of Governors which reflects average chargeable costs. The level of costs assessed depends on the stage at which a matter is resolved. The use of these cost models is appropriate as a simple and efficient means

of assessing costs, but does not prevent a respondent from seeking, or a hearing judge from granting, relief from costs in an appropriate case.

[2 a, b] **135 Procedure—Rules of Procedure**
178.77 Relief from Costs—Showing Required
Under Business and Professions Code section 6086.10(c) and rules 462 and 464 of the Transitional Rules of Procedure, an attorney ordered to pay disciplinary costs may be granted full or partial relief from such order, or an extension of time to pay, based on hardship, special circumstances, or other good cause. Good cause for such relief may include consideration of the conduct of counsel for the State Bar.

[3 a-d] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
167 Abuse of Discretion
178.71 Relief from Costs—Granted
It was not an abuse of discretion for the hearing judge to conclude that partial relief from costs was justified, even in the absence of evidence of bad faith on the part of counsel for the State Bar, based on the State Bar's lack of responsiveness to respondent's extraordinary efforts to provide information and good faith offers to settle the matter prior to the filing of formal charges. Elimination of all costs assessed for the stage after filing formal charges, and of half of the State Bar's costs for the pre-filing stage, was within the hearing judge's discretion.

[4] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
178.90 Costs—Miscellaneous
Where a party sought review by the Presiding Judge of an order granting relief from costs under rule 462(c) of the Transitional Rules of Procedure, and the matter presented an important question of first impression, the Presiding Judge referred the matter to the review department in bank.

[5] **167 Abuse of Discretion**
178.90 Costs—Miscellaneous
The appropriate standard of review for an order granting relief from costs is abuse of discretion, which is the standard of review for orders taxing costs in civil cases and is also the standard of review generally applied to procedural motions in the State Bar Court.

[6] **167 Abuse of Discretion**
Where the standard of review is abuse of discretion, it is inappropriate for the review department to reconsider the evidence below as if it were deciding the matter de novo. The exercise of discretion will not be disturbed unless it is abused, and while an appellate court may have ruled differently on the motion, it cannot substitute its own view as to the proper decision. To find an abuse of discretion, it must clearly appear that the result was a manifest miscarriage of justice.

[7] **178.71 Relief from Costs—Granted**
Reducing costs recoverable by the State Bar in a disciplinary matter by a significant amount where, in the interest of justice, it appears appropriate, serves the salutary purposes of both promoting substantial savings in litigant and judicial resources and enhancing public protection by discouraging unnecessary delay in the imposition of stipulated discipline.

ADDITIONAL ANALYSIS

[None.]

ORDER AND OPINION ON PETITION FOR REVIEW OF ORDER GRANTING RELIEF FROM COSTS[1]

PEARLMAN, P.J.:

This petition for review by the Office of Trials presents for the first time the interpretation of the scope of a hearing judge's authority to grant relief from costs under Business and Professions Code section 6086.10.

The hearing judge partially granted respondent's motion for relief from costs following the issuance of a Supreme Court order awarding costs to the State Bar in connection with the imposition of a nine-month stayed suspension pursuant to stipulation approved by the same hearing judge. The cost certificate totaled $3,696, consisting of State Bar Court costs of $678, and Office of Investigation and Office of Trial Counsel costs in the amounts of $2,709 and $309 respectively. **[1a]** These cost assessments, made pursuant to rules 460 and 461 of the Rules of Procedure, were derived from a formula established by a committee of the State Bar Board of Governors in 1988 and reflect average chargeable costs for cases which are resolved by stipulated disposition after commencement of formal proceedings, but before trial. Costs of cases resolved at this stage are called Level II costs, as opposed to average chargeable costs assessed on cases which result in a stipulated disposition prior to the filing of the notice to show cause which are called Level I costs.[2]

Recoverable costs do not include any attorneys' time. The Office of Investigation's costs for an investigated file are based upon the average hourly salary figures of the investigative staff, the legal assistants, and the support staff multiplied by the average amount of time spent by these individuals, plus a fixed percentage charge to cover the estimated costs of copying, postage, supplies and other miscellaneous costs. The costs of the Office of Trial Counsel and the Office of State Bar Court are similarly computed based on average non-attorney staff time and other costs, but are assessed per case, instead of per count.

Respondent petitioned the hearing judge for relief from all costs pursuant to rule 462 of the Rules of Procedure and, in the alternative, limitation of cost recovery to Level I costs.[3] Respondent argued that the Level II assessments were excessive since petitioner repeatedly and in good faith endeavored to negotiate disposition of the matter prior to filing of the notice to show cause, including offering to stipulate to the same level of discipline as was ultimately agreed upon and approved. Respondent further argued that the parties' inability to come to agreement before the filing of the notice to show cause was due solely to the intransigence of the counsel representing the State Bar. Respondent also argued that the computation and application of the various cost assessment levels resulted in an unfair distribution of the cost burden in this case because of alleged extraordinary cooperation of the respondent which substantially reduced the actual burden on the State Bar.

[2a] Business and Professions Code section 6086.10(c) provides that "A member may be granted relief, in whole or in part, from an order assessing costs under this section, or may be granted an extension of time to pay these costs, in the discretion of the

1. Normally, no published opinion would result from a petition for review of an order pursuant to rule 462 of the Transitional Rules of Procedure of the State Bar (hereafter "Rules of Procedure" or "Rules Proc. of State Bar"). At respondent's counsel's request and there being no objection raised by the Office of Trials, this opinion does not designate the name of the respondent.

2. Not involved in this proceeding are two other levels of cost assessments: Level III which is charged in cases where a stipulation is reached at the time of trial or in which a trial is held not exceeding one day; and Level IV which is charged in disciplinary matters where the trial exceeds one day.

3. According to the formula, the difference between Level I cost assessments and Level II cost assessments is a total of $419. The costs of investigation remain the same for either level—$387 per file, totaling $2,709 for the seven counts investigated in connection with this case. The Level I cost assessment of the Office of Trial Counsel is $95 as opposed to the Level II cost of $309 per case. The Office of State Bar Court cost assessment is $473 at Level I as opposed to $678 at Level II.

State Bar, upon grounds of hardship, special circumstances, or other good cause." Consistent therewith, rule 462(a) of the Rules of Procedure permits a member assessed costs under rule 460 to petition the court for relief therefrom on "grounds of hardship, special circumstances or other good cause." A parallel rule, rule 464, permits the Chief Trial Counsel or designee, in the exercise of discretion where a case is settled prior to trial, to stipulate to relieve a member "in whole or in part" from the obligation to pay costs "upon grounds of hardship, special circumstances or other good cause."

[3a] The hearing judge considered the petition and accompanying documentation as well as the opposing papers, heard oral argument and issued a written decision addressing all of the issues raised by both parties. She concluded that the following special circumstances and good cause justified relief from Level II costs: that respondent made extraordinary efforts over an 11-month period to resolve matters at the Level I stage; that the State Bar failed to respond meaningfully to such overtures and that the State Bar ultimately agreed to a disposition which the respondent had offered at the pre-notice stage. She further found that the following special circumstances also justified reducing Level I costs by 50 percent: respondent's efforts to provide information and documentation prior to the filing of the notice were extraordinary and beyond his duties pursuant to Business and Professions Code section 6068 (i); respondent was required to repeat much of his effort due to the assignment of successive attorneys to his case prior to issuance of the notice;[4] and respondent was unable to obtain meaningful responses to his good faith written offers of settlement or his positions on factual and legal issues for a substantial period of time.

[4] The Office of Trials timely sought review before the Presiding Judge pursuant to rule 462(c) of the Rules of Procedure, and the Presiding Judge referred the matter to the Review Department in bank since it presented an important question of first impression. No case law has interpreted the hardship, good cause or special circumstances requirement of Business and Professions Code section 6086.10 or rule 462.

[5] Neither party addressed the appropriate standard of review in their briefs, but at oral argument both parties agreed that the appropriate standard of review is abuse of discretion. That is the standard applied on review of orders taxing costs in civil cases (see, e.g., *Posey* v. *State of California* (1986) 180 Cal.App.3d 836, 852) and is also the standard of review generally applied to procedural motions in the State Bar Court. (See, e.g., *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 214; cases digested in Cal. State Bar Ct. Rptr. Digest, topic number 167; see also *In the Matter of Mollica* (State Bar Ct. No. 88-O-12199), order denying petition for review filed October 28, 1992 [recognizing hearing judge's discretion to grant late filing of petition for relief from costs].)

[6] It is thus inappropriate for this review department to reconsider the evidence below as if it were deciding this issue de novo under rule 450. "In situations where the trial judge has either by express statute or by rule of policy a discretionary power to decide the issue, the exercise of discretion will not be disturbed unless it is abused. While we may have ruled differently had we heard the motion, the appellate court may not substitute its own view as to the proper decision." (*San Bernardino City Unified School Dist.* v. *Superior Court* (1987) 190 Cal.App.3d 233, 240-241, citing 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 275, p. 286.) "'To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice.'" (*San Bernardino, supra*, 190 Cal.App.3d at p. 241, quoting *Brown* v. *Newby* (1940) 39 Cal.App.2d 615, 618.)

The Office of Trials contends that the hearing judge abused her discretion in granting relief to respondent, asserting that respondent did not cooperate more than he was otherwise required to do; that

4. There were a total of five successive attorneys who represented the State Bar—three prior to filing of the notice to show cause and two thereafter.

the fact that there were successive examiners with whom respondent's counsel had to renegotiate did not justify relief; that respondent did not establish that actual costs of the State Bar were reduced below the costs sought to be assessed and that even if a respondent could show that the actual costs were lower than the cost models, the cost models should be used in any event. Finally, the Office of Trials contends that to use the ultimate settlement as a basis for granting relief from costs sets a dangerous precedent in which the court is put in the position of second-guessing either party's reasons for not settling sooner. All of these arguments were raised below and rejected by the hearing judge.

In opposition, respondent's counsel argues that the Office of Trials' petition for review is without foundation and brought in bad faith and that the only available remedy for harm caused by failure on the part of counsel for the State Bar to act reasonably and in good faith is to request relief from disciplinary costs. Respondent's counsel contends that the position taken by counsel for the State Bar against stipulating to a waiver of disciplinary costs, and its conduct in fighting relief therefrom at two levels in the court, penalizes respondents to the point of rendering their ability to seek court intervention economically unfeasible. He also argues that the policy is "penny-wise and pound foolish" and "disserves the disciplinary system" by increasing the cost of disciplinary proceedings unnecessarily.

[3b] First of all, the hearing judge did not find that counsel for the State Bar acted in bad faith and we see no evidence of bad faith. **[1b]** We also agree with the Office of Trials that the use of cost models is a simple and efficient means of assessing costs and that recovery of costs in eligible cases should be the norm in order to effectuate the statutory goal of recouping part of the costs of imposing discipline from the specific attorneys found culpable of misconduct. No benefit would have been obtained from a review by the parties and the hearing judge of the manner of computation of the average costs and a determination of whether the actual costs in this case exceeded or were lower than such costs.

[1c] We disagree, however, with the examiner's assertion that the formulaic method of cost assessment should prevent a respondent from seeking relief from costs in a particular case on grounds such as those presented here. The purpose of a cost formula, fairly computed, is to take the place of individualized assessment. An enormous amount of time and effort would be involved if the disciplinary system had to track particular costs associated with every case. It is therefore deemed appropriate for the presumptive amount of recoverable costs in any case to be the amount established by the formula adopted by the State Bar pursuant to its rulemaking authority regardless of its actual costs in the particular case. The formulaic method of attributing costs does not, however, in any way impede the hearing judge from determining that good cause exists for relief in an appropriate case.

[2b] The question therefore arises as to the scope of good cause. No case law or legislative history has been cited to guide us, but the examiner conceded at oral argument that good cause for relief from costs could include, on appropriately egregious facts, consideration of the conduct of counsel for the State Bar. He contended, however, that on the facts of this case such relief was not warranted. That argument was considered and rejected by the hearing judge below. **[3c]** The elimination of all Level II costs, including court costs, was clearly within her discretion in the interest of justice since Level II assessments are only made if the settlement occurs after filing of the notice to show cause and there was a determination that no notice needed to have been filed here.

[3d] The hearing judge also exercised her discretion to halve the Office of Trial Counsel's Level I costs.[5] No abuse was shown in this regard either.

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5. Although the decision below referred to all Level I costs, the hearing judge only ordered the Office of Trial Counsel to prepare a new certificate of costs consistent with the reduction of Level I costs by 50 percent and made no similar directive to the clerk of the State Bar Court with respect to halving Level I court costs. Nor does any rationale appear in her decision for reducing Level I court costs, which respondent would have had to pay in any event. We therefore construe the ambiguity in the decision as not intending to reduce court costs below Level I. If we were to construe it otherwise, we would have to conclude that it was an abuse of discretion for the judge to halve the recoverable Level I court costs without any explanation for doing so.

Respondent recognized that no matter how cooperative he was and how responsive counsel for the State Bar were, certain costs would be chargeable to him in connection with the stayed suspension to which he stipulated, even if such result had been reached very early in the negotiations. The hearing judge determined, however, that his cooperation was extraordinary, saving the disciplinary system substantial effort in analyzing his prior trust account balances and providing the State Bar with a road map of the client accounts in controversy. She also determined that the lack of timely response by counsel for the State Bar significantly delayed the disposition of the proceeding.

Reduction of formulaic costs for savings which are difficult to quantify cannot be done with precision and any attempt to so require would defeat the exercise by the consumption of undue litigant and court time. [7] Reducing recoverable costs by a significant amount where, in the interest of justice, it appears appropriate, serves the salutary purposes of both promoting substantial savings in litigant and judicial resources and enhancing public protection by discouraging unnecessary delay in imposition of stipulated discipline. To reject the authority of the judge to interpret good cause in this manner would disserve the disciplinary system and the general membership of the State Bar which pays for the system with its dues.

The requested relief from the hearing judge's order is DENIED. The clerk is directed to prepare a revised certificate of costs awarding a total of $1,875 consisting of Office of Investigation costs in the amount of $1,354.50; Office of Trial Counsel costs in the amount of $47.50, and State Bar Court costs in the amount of $473.

We concur:

NORIAN, J.
VELARDE, J.*

* By appointment of the Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.